

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA : S1 00 Cr. 1176 (LTS)  
  
v. : Filed:  
  
MELVYN H. MERBERG, : Violations: 15 U.S.C. § 1  
 : 18 U.S.C. § 371  
Defendant. :

----- x

SUPERSEDING INFORMATION

COUNT ONE -- SHERMAN ACT CONSPIRACY  
(15 U.S.C. § 1)

The United States of America, acting through its attorneys, charges:

1. Melvyn H. Merberg ("Merberg") is hereby made a defendant on the charge stated below.

I. THE RELEVANT PARTIES AND ENTITIES

During the period covered by this Count:

2. Merberg resided in Kings Point, New York and in Manhattan, New York.

Merberg was the chief executive officer of Jitney, Ltd. ("Jitney").

3. Jitney, a corporation owned by Merberg's spouse, was headquartered in Queens, New York. Jitney was a vendor of food and related items.

4. The Department of Citywide Administrative Services of the City of New York ("DCAS") was the agency that provided support to various city entities that served the public, including those that provide hospitals, jails, homeless shelters, and other

facilities. DCAS became responsible for providing this support in July 1996 when it replaced the New York City Department of General Services. Through its Division of Municipal Supply Services, DCAS conducted competitive bidding on behalf of several New York City entities, including the Health and Hospitals Corporation, the Department of Juvenile Justice, the Department of Correction, the Department of Homeless Services, the Human Resources Administration, and the Administration for Children's Services.

5. DCAS sought separate bids, and awarded separate contracts, for the supply of a number of categories of food, including produce. Each of the produce bids was divided into parts, primarily geographically by borough. With respect to the award of produce contracts, the company bidding the lowest aggregate price for each particular part of a contract usually received an award for that part. Toward the expiration of the contract period, DCAS again solicited bids.

6. The primary food contracts awarded by DCAS were requirements contracts that obligated the vendors to supply and deliver food at the stated prices for the contract period. Individual municipal facilities placed orders as needed, usually once or twice a week.

7. Whenever in this Count reference is made to any act, deed, or transaction of any corporation, such allegation shall be deemed to mean that the corporation engaged in such act, deed, or transaction by or through its officers, directors, agents, employees, or other representatives while they were actively engaged in the management, direction, control, or transaction of its business or affairs.

8. Various persons and firms, not made defendants herein, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

## II. TRADE AND COMMERCE

9. During the period covered by this Count, Jitney purchased substantial quantities of food, including produce, for resale to the DCAS entities from suppliers located throughout the United States, or from wholesalers who obtained their goods from suppliers located throughout the United States.

10. From approximately May 1997 until approximately 1998, pursuant to contracts that are the subject of this Count, Jitney sold a substantial quantity of food, primarily produce, to the DCAS entities.

11. The activities of the defendant and co-conspirators with respect to the sale of food, primarily produce, to the DCAS entities pursuant to contracts that are the subject of this Count, were within the flow of, and substantially affected, interstate trade and commerce.

## III. DESCRIPTION OF THE OFFENSE

12. From approximately May 1997 until approximately 1998, the exact dates being unknown to the United States, the defendant and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (Title 15, United States Code, Section 1).

13. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendant and co-conspirators, the substantial terms of which were to rig bids and allocate contracts for the supply of produce to the DCAS entities.

14. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendant and co-conspirators did those things which they combined and conspired to do, including, among other things:

(a) Merberg instructed Jitney salesperson Michael Beberman (“Beberman”) to discuss and agree with Selwyn Lempert (“Lempert”), a vice president at Nick Penachio Co., Inc., a food company located in the Bronx, New York, how their companies could bid so as to divide upcoming contracts to supply produce to the DCAS entities;

(b) With Merberg’s knowledge and approval, Beberman and Lempert designated which company would be the low bidder, between their companies, on specified parts of contracts to supply produce to the DCAS entities;

(c) With Merberg’s knowledge and approval, Beberman and Lempert discussed and agreed on the prices or price levels each company would bid on specified parts of contracts to supply produce to the DCAS agencies, and then bid accordingly;

(d) With Merberg’s knowledge and approval, Beberman refrained from bidding or submitted intentionally high, complementary bids on specified parts of contracts to supply produce to the DCAS entities; and

(e) Merberg gave substantial amounts of cash to Beberman, with the understanding that Beberman would pass the money on to Lempert, who would use the cash to pay potential competitors not to bid competitively on particular contracts to supply produce to the DCAS entities.

#### IV. JURISDICTION AND VENUE

15. The aforesaid combination and conspiracy was formed and carried out, in part, within the Southern District of New York within the five years preceding the filing of this Superseding Information.

IN VIOLATION OF TITLE 15, UNITED STATES CODE, SECTION 1

#### COUNT TWO -- SHERMAN ACT CONSPIRACY (15 U.S.C. § 1)

The United States of America further charges:

16. Paragraphs 1 through 3 and Paragraphs 7 and 8 of Count One of this Superseding Information are repeated, realleged, and incorporated in Count Two as if fully set forth in this Count.

#### V. THE RELEVANT PARTIES AND ENTITIES

During the period covered by this Count:

17. The Nassau County Department of General Services (“Nassau DGS”) was the agency responsible for managing procurement on behalf of the agencies of Nassau County, New York, including the agency that administered the Nassau County correctional facilities.

18. The Nassau DGS sought separate bids, and awarded separate contracts, for the supply of a number of categories of food, including produce and dairy items. The company bidding the lowest price for the contract usually received an award of that contract. The term of the contracts for produce and for dairy items was usually one month. Toward the expiration of the contract period, the Nassau DGS again solicited bids.

19. The primary food contracts awarded by the Nassau DGS were requirements contracts that obligated the vendors to supply and deliver food at the stated prices for the contract period. The facilities whose contracts were handled by the Nassau DGS placed orders as needed, usually once or twice a week.

## VI. TRADE AND COMMERCE

20. During the period covered by this Count, Jitney purchased substantial quantities of food, including produce, for resale to entities whose contracts were handled by the Nassau DGS, primarily the Nassau County Correctional Center (“NCCC”), from suppliers located throughout the United States, or from wholesalers, who obtained their goods from suppliers located throughout the United States.

21. From approximately late 1995 until approximately 1998, pursuant to contracts that are the subject of this Count, Jitney sold a substantial quantity of food, primarily produce, to entities whose contracts were handled by the Nassau DGS, primarily the NCCC.

22. The activities of the defendant and co-conspirators with respect to the sale of produce and dairy items to entities whose contracts were handled by the Nassau DGS, primarily the NCCC, including the sale of produce and dairy items pursuant to contracts that are the subject of this Count, were within the flow of, and substantially affected, interstate trade and commerce.

## VII. DESCRIPTION OF THE OFFENSE

23. From approximately late 1995 until approximately 1998, the exact dates being unknown to the United States, the defendant and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (Title 15, United States Code, Section 1).

24. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendant and co-conspirators, the substantial terms of which were to rig bids and allocate contracts for the supply of produce and dairy items to entities whose contracts were handled by the Nassau DGS, primarily the NCCC.

25. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendant and co-conspirators did those things which they combined and conspired to do, including, among other things:

(a) Prior to the submission of bids to the Nassau DGS for the supply of produce and for the supply of dairy items, Jitney salesperson Michael Beberman (“Beberman”), acting with Merberg’s knowledge and approval, and Selwyn Lempert

("Lempert"), a vice president at Nick Penachio Co., Inc., a food company located in the Bronx, New York, discussed and agreed how to bid so as to divide upcoming contracts. In general, the conspirators agreed that, at least between their companies, Jitney and Nick Penachio Co., Inc. would rotate being the low bidder for the monthly produce contract. In addition, Beberman and Lempert agreed that Jitney would submit intentionally non-competitive bids for the monthly contract for dairy items, in order to create the appearance of competition on those bids;

(b) With Merberg's knowledge and approval, Beberman and Lempert discussed and agreed on the prices or price levels each company would bid to the Nassau DGS for contracts to supply produce and dairy items, and then bid accordingly; and

(c) With Merberg's knowledge and approval, Beberman refrained from bidding or submitted intentionally high, complementary bids to the Nassau DGS for contracts to supply produce and dairy items to the NCCC.

#### VIII. JURISDICTION AND VENUE

26. The aforesaid combination and conspiracy was formed and carried out, in part, within the Southern District of New York within the five years preceding the filing of this Superseding Information.

IN VIOLATION OF TITLE 15, UNITED STATES CODE, SECTION 1



COUNT THREE -- SHERMAN ACT CONSPIRACY  
(15 U.S.C. § 1)

The United States of America further charges:

27. Paragraphs 1 through 3 and Paragraphs 7 and 8 of Count One of this Superseding Information are repeated, realleged, and incorporated in Count Three as if fully set forth in this Count.

IX. THE RELEVANT PARTIES AND ENTITIES

During the period covered by this Count:

28. The Newark Public Schools operated the public school system in Newark, New Jersey. That system, the largest in New Jersey, serviced approximately 44,000 students and operated more than 80 facilities. The Newark Public Schools served more than 7 million meals each year and spent about \$7 million annually on food and milk. The Newark Public Schools' annual budgets were funded by the federal, state, and city governments, including funding pursuant to the National School Lunch Act of 1946.

29. The Newark Public Schools sought separate bids, and awarded separate contracts, for the supply of a number of categories of food, including produce and frozen vegetables. The company bidding the lowest total price for the produce and frozen vegetable contract usually received an award of that contract. Toward the expiration of the contract period, the Newark Public Schools again solicited bids.

30. The primary food contracts awarded by the Newark Public Schools were requirements contracts that obligated the vendors to supply and deliver food at the stated

prices for the contract period. The schools maintained by the Newark Public Schools placed orders as needed, usually once or twice a week.

#### X. TRADE AND COMMERCE

31. During the period covered by this Count, Jitney purchased substantial quantities of food, including produce and frozen vegetables, for resale to the Newark Public Schools from suppliers located throughout the United States, or from wholesalers who obtained their goods from suppliers located throughout the United States.

32. From approximately late 1995 until approximately April 1999, pursuant to contracts that are the subject of this Count, Jitney sold substantial quantities of produce and frozen vegetables, to the Newark Public Schools.

33. The activities of the defendant and co-conspirators with respect to the sale of food to the Newark Public Schools, including the sale of produce and frozen vegetables pursuant to contracts that are the subject of this Count, were within the flow of, and substantially affected, interstate trade and commerce.

#### XI. DESCRIPTION OF THE OFFENSE

34. From approximately late 1995 until approximately April 1999, the exact dates being unknown to the United States, the defendant and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (Title 15, United States Code, Section 1).

35. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendant and

co-conspirators, the substantial terms of which were to rig bids and allocate contracts for the supply of produce and frozen vegetables to the Newark Public Schools.

36. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendant and co-conspirators did those things which they combined and conspired to do, including, among other things:

(a) With Merberg's knowledge and approval, prior to the submission of bids for the supply of produce and frozen vegetables, Jitney salesperson Michael Beberman ("Beberman") and Selwyn Lempert ("Lempert"), a vice president at Nick Penachio Co., Inc., a food company located in the Bronx, New York, discussed and agreed how to bid so as to divide upcoming contracts. In general, the conspirators agreed that, at least between Jitney and Nick Penachio Co., Inc., those two companies would alternate being the low bidder;

(b) With Merberg's knowledge and approval, Beberman and Lempert discussed and agreed on the prices or price levels each company would bid for contracts to supply produce and frozen vegetables to the Newark Public Schools, and then bid accordingly; and

(c) With Merberg's knowledge and approval, Beberman refrained from bidding or submitted intentionally high, complementary bids for contracts to supply produce and frozen vegetables to the Newark Public Schools.

## XII. JURISDICTION AND VENUE

37. The aforesaid combination and conspiracy was formed and carried out, in part, within the Southern District of New York within the five years preceding the filing of this Superseding Information.

IN VIOLATION OF TITLE 15, UNITED STATES CODE, SECTION 1

### COUNT FOUR -- SHERMAN ACT CONSPIRACY (15 U.S.C. § 1)

The United States of America further charges:

38. Paragraphs 1 through 3 and Paragraphs 7 and 8 of Count One of this Superseding Information are repeated, realleged, and incorporated in Count Four as if fully set forth in this Count.

## XIII. THE RELEVANT PARTIES AND ENTITIES

During the period covered by this Count:

39. Odyssey House, Inc. ("Odyssey House") was a not-for-profit residential substance abuse treatment organization located in Manhattan. Odyssey House received a significant portion of its funding from the State of New York Office of Alcoholism and Substance Abuse Services ("OASAS"). As a condition of that funding, OASAS required Odyssey House to solicit at least three competitive bids before it purchased any items which, in the aggregate, totaled at least \$3,000 during any 60-day period. Odyssey House solicited bids from potential vendors of most goods and services, including food and related items.

40. Aaron Lugo (“Lugo”), the director of operations at Odyssey House, was a co-conspirator. Lugo had primary responsibility at Odyssey House for purchasing most goods and services, including food and related items.

41. Frank Fauci (“Fauci”) was a co-conspirator who sold food and related items. Fauci operated Tristar, a corporation located in Brooklyn, New York. Fauci also served as an independent sales representative for a food company located in the Bronx, New York, that was a co-conspirator.

#### XIV. TRADE AND COMMERCE

42. During the period covered by this Count, Jitney purchased substantial quantities of food and related items for resale to Odyssey House from suppliers located throughout the United States, or from wholesalers, who obtained their goods from suppliers located throughout the United States.

43. From approximately 1990 until approximately April 1998, pursuant to contracts that are the subject of this Count, Jitney sold substantial quantities of food and related items to Odyssey House.

44. The activities of the defendant and co-conspirators with respect to the sale of food and related items to Odyssey House, including the sale of food and related items pursuant to contracts that are the subject of this Count, were within the flow of, and substantially affected, interstate trade and commerce.

## XV. DESCRIPTION OF THE OFFENSE

45. From approximately 1990 until approximately April 1998, the exact dates being unknown to the United States, the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (Title 15, United States Code, Section 1).

46. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were to rig bids and allocate contracts for the supply of food and related items awarded by Odyssey House.

47. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do, including, among other things:

(a) Prior to bid openings, Merberg, Fauci, and Lugo participated in meetings and conversations where they discussed and agreed how to divide upcoming bids to supply food and related items to Odyssey House;

(b) Merberg, Fauci, and Lugo designated which co-conspirator companies would be the low bidders on specified parts of contracts to supply food and related items to Odyssey House;

(c) Merberg, Fauci, and Lugo discussed and agreed on the prices co-conspirator companies would bid on specified parts of contracts to supply food and related items to Odyssey House, and then the co-conspirator companies bid accordingly;

(d) Merberg and Fauci refrained from bidding or submitted intentionally high, complementary bids on specified parts of contracts to supply food and related items to Odyssey House; and

(e) Merberg paid money and provided goods and services to Lugo and to another senior executive at Odyssey House for their assistance in frustrating and subverting Odyssey House's program for seeking competitive bids for contracts for food and related items, and for ensuring that no potential competitors who were not co-conspirators would be invited to bid on contracts for food and related items awarded by Odyssey House.

#### XVI. JURISDICTION AND VENUE

48. The aforesaid combination and conspiracy was formed and carried out, in part, within the Southern District of New York within the five years preceding the filing of this Superseding Information.

IN VIOLATION OF TITLE 15, UNITED STATES CODE, SECTION 1

#### COUNT FIVE -- CONSPIRACY (18 U.S.C. § 371)

The United States of America further charges:

49. Paragraphs 1 through 3 and Paragraphs 7 and 8 of Count One and Paragraphs 39 and 40 of Count Four of this Superseding Information are repeated, realleged, and incorporated in Count Five as if fully set forth in this Count.

## XVII. DESCRIPTION OF THE OFFENSE

50. From approximately September 1987 until approximately April 1998, the exact dates being unknown to the United States, the defendant and co-conspirators did unlawfully, willfully, and knowingly conspire, combine, confederate, and agree to (a) defraud Odyssey House; (b) obtain money and property from Odyssey House by means of false and fraudulent pretenses, representations, and promises; and (c) deprive Odyssey House of its right to the honest services of certain of its employees, which scheme and artifice was executed by and through the use of the United States mails, in violation of Title 18, United States Code, Sections 1341 and 1346, all in violation of Title 18, United States Code, Section 371.

## XVIII. THE MANNER AND MEANS BY WHICH THE CONSPIRACY WAS CARRIED OUT

The manner and means by which the conspiracy was sought to be accomplished included, among others, the following:

51. During all or some of the period from approximately September 1987 until approximately April 1998, Merberg, or others acting at Merberg's direction, paid to Lugo approximately \$200,000 in cash kickbacks. These kickbacks were calculated according to a percentage, usually 4% or 5%, of the total value of orders that Jitney actually delivered to Odyssey House. Merberg paid the kickbacks in order to ensure that Lugo would allocate to Jitney a portion of the contracts for food and related items awarded by Odyssey House.



52. In addition, during all or some of the period from approximately 1991 until approximately April 1998, Merberg and Lugo embezzled approximately \$1,084,751 from Odyssey House. Lugo caused Odyssey House to issue false and fraudulent purchase orders to Jitney, and then Merberg caused Jitney to issue corresponding false and fraudulent invoices. The purchase orders were false and fraudulent in that they purported to order food and related items that were not intended to be delivered. The invoices issued by Jitney were false and fraudulent in that they billed for goods and services never in fact delivered. The conspirators falsely certified that Odyssey House had received all of the goods described in those purchase orders and invoices, and thereby caused Odyssey House to pay the full amount stated in them. In actuality, Jitney provided none of the food and related items described in the false and fraudulent purchase orders and invoices. After receiving payment from Odyssey House on the false and fraudulent invoices, which payments were usually sent through the United States mails, Merberg returned 40%-50% of the face value of those invoices in cash to Lugo. Beginning in approximately late 1994, Lugo shared his proceeds from the embezzlement with another senior executive of Odyssey House.

#### XIX. OVERT ACTS

In furtherance of the conspiracy, and to effect the objects thereof, the following overt acts were committed in the Southern District of New York, and elsewhere:

53. On approximately November 22, 1991, Jitney issued to Odyssey House a false and fraudulent invoice in the amount of \$1,513.35.

54. On approximately August 14, 1992, Jitney issued to Odyssey House a false and fraudulent invoice in the amount of \$538.90.

55. On approximately June 11, 1992, Merberg paid Lugo a cash kickback of \$2,500.

56. Between 1991 and April 1998, Merberg caused Jitney to issue to Odyssey House numerous false and fraudulent invoices. Many of these invoices were sent to Odyssey House through the United States mails. In addition, Odyssey House paid these invoices by checks sent through the United States mails.

57. Between 1991 and April 1998, Lugo caused Odyssey House to issue to Odyssey House numerous false and fraudulent purchase orders. Many of these purchase orders were sent to Jitney through the United States mails.

58. On numerous occasions between September 1987 and April 1998, Merberg gave cash to Lugo at Lugo's office in Manhattan, and at various restaurants in Manhattan.

IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 371

COUNT SIX -- CONSPIRACY  
(18 U.S.C. § 371)

The United States of America further charges:

59. Paragraphs 1 through 3 and Paragraphs 7 and 8 of Count One of this Superseding Information are repeated, realleged, and incorporated in Count Six as if fully set forth in this Count.

60. Jitney sold food and related items to numerous customers besides Odyssey House, Inc. (collectively the "Jitney Customers") that were mostly not-for-profit social service organizations located in New York City and the surrounding area. Those organizations received funding from the federal, state, and local governments.

## **XX. DESCRIPTION OF THE OFFENSE**

61. From at least as early as June 1984 and continuing until at least early 2000, the exact dates being unknown to the United States, the defendants and co-conspirators did unlawfully, willfully, and knowingly conspire, combine, confederate, and agree to (a) defraud approximately 147 different Jitney Customers; (b) obtain money and property from approximately 147 different Jitney Customers by means of false and fraudulent pretenses, representations, and promises; and (c) deprive approximately 147 different Jitney Customers of their right to the honest services of certain of their employees, which scheme and artifice was executed by and through the use of the United States mails, in violation of Title 18, United States Code, Sections 1341 and 1346, all in violation of Title 18, United States Code, Section 371.

## **XXI. THE MANNER AND MEANS BY WHICH THE CONSPIRACY WAS CARRIED OUT**

The manner and means by which the conspiracy was sought to be accomplished included, among others, the following:

62. During all or some of the period from at least June 1984 until at least early 2000, the defendants and co-conspirators paid approximately \$1 million in cash

kickbacks to employees of approximately 147 different Jitney Customers. Most of the employees who received kickbacks were purchasing agents, but they also included accounts payable clerks and cooks. The kickbacks were usually calculated according to a percentage, between 1% and 7%, of the total value of orders that Jitney actually delivered to those Jitney Customers. They ranged in size from a single payment of \$20 to regular payments of \$500 or more per month. The defendants and co-conspirators paid kickbacks in order to ensure that those employees would allocate to Jitney a portion of the contracts for food and related items awarded by those approximately 147 different Jitney Customers or to speed the Jitney Customers' payments to Jitney.

63. In addition, during all or some of the period from at least as early as 1993 until at least April 1998, the defendants and co-conspirators and certain employees of several of the Jitney Customers embezzled a total of approximately \$100,000 from those Jitney Customers by causing Jitney to issue false and fraudulent invoices to those Jitney Customers. The invoices, which were usually sent through the United States mails, were false and fraudulent in that they billed for goods and services that were never in fact delivered. The employees then caused their employers to pay those invoices, usually by checks sent through the United States mails. In return, the employees received cash, usually equal to 40% of the face value of those invoices.

64. Merberg and other Jitney executives and employees maintained and made entries recording the kickbacks and embezzlement payments in one or more journals or computer programs. Merberg destroyed some of these records, and ordered certain Jitney

employees to alter or destroy other business records, after Jitney was served with a grand jury subpoena duces tecum demanding their production.

## XXII. OVERT ACTS

In furtherance of the conspiracy, and to effect the objects thereof, the following overt acts were committed in the Southern District of New York, and elsewhere:

65. Between 1993 and April 1998, Jitney issued numerous false and fraudulent invoices to certain Jitney Customers. Many of these invoices were sent to those Jitney Customers through the United States mails. The Jitney Customers usually paid the invoices by checks sent through the United States mails.

66. On numerous occasions between 1984 and early 2000, the defendants and co-conspirators gave cash to employees of certain Jitney Customers, many of whom were located in Manhattan and the Bronx. Merberg had some of this cash sent to certain of these employees through the United States mails.

IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 371

### COUNT SEVEN -- CONSPIRACY (18 U.S.C. § 371)

The United States of America further charges:

67. Paragraphs 1 through 3 and Paragraphs 7 and 8 of Count One of this Superseding Information are repeated, realleged, and incorporated in Count Seven as if fully set forth in this Count.

### XXIII. DESCRIPTION OF THE OFFENSE

68. From approximately 1992 until approximately 1998, the exact dates being unknown to the United States, Merberg and co-conspirators did unlawfully, willfully, and knowingly conspire, combine, confederate, and agree to defraud the United States of America and the Internal Revenue Service ("IRS") by impeding, impairing, defeating, and obstructing the lawful governmental functions of the IRS in the ascertainment, evaluation, assessment, and collection of federal income taxes, and to commit offenses against the United States, to wit, to violate Sections 7201, 7206(1) and 7206(2) of Title 26, United States Code, all in violation of Title 18, United States Code, Section 371.

69. It was a part and object of the conspiracy that Merberg and others known and unknown would and did defraud the IRS by impeding, impairing, obstructing, and defeating the lawful government functions of the IRS in ascertaining, evaluating, assessing, and collecting federal income taxes due and owing from Jitney and Merberg by impeding and impairing the IRS's ability to determine accurately the income and expenses of Jitney, by overstating the company's cost of goods sold or other deductions so as to conceal the raising and accumulation of substantial amounts of cash which were never reflected on Jitney's books and records.

70. It was a further part and object of the conspiracy that Merberg and his co-conspirators would and did unlawfully, willfully, and knowingly attempt to evade and defeat a substantial part of the income tax due and owing to the United States by Merberg and others, in violation of Title 26, United States Code, Section 7201.

71. It was a further part and object of the conspiracy that Merberg caused Jitney unlawfully, willfully, and knowingly to make and subscribe to a U.S. Corporation Income Tax Return, Form 1120, for the tax year 1992, and to U.S. Income Tax Returns for an S Corporation, Forms 1120S, for the tax years 1993, 1994, 1995, 1996, and 1997, each of which was verified by a written declaration that it was made under penalties of perjury, and which income tax returns the company did not believe to be true and correct as to every material matter, insofar as each of them substantially overstated Jitney's true cost of goods sold or other deductions, and thereby substantially understated Jitney's true total income, in violation of Title 26, United States Code, Section 7206(2).

72. It was a further part and object of the conspiracy that Merberg unlawfully, willfully, and knowingly did make and subscribe to U.S. Individual Income Tax Returns, Forms 1040, for the calendar years 1992, 1993, 1994, 1995, 1996, and 1997, each of which was verified by a written declaration that it was made under penalties of perjury, and which income tax returns Merberg did not believe to be true and correct as to every material matter, insofar as each of them substantially understated his and his spouse's true total income, in violation of Title 26, United States Code, Section 7206(1).

#### **XXIV. THE MANNER AND MEANS BY WHICH THE CONSPIRACY WAS CARRIED OUT**

The manner and means by which the conspiracy was sought to be accomplished included, among others, the following:

73. Merberg caused Jitney to issue checks to certain sham companies, and improperly to deduct the amount of those checks as cost of goods sold or other deductions on Jitney's corporate income tax returns, as described below:

(a) Merberg and co-conspirator Martin Schwartz ("Schwartz"), caused sham companies that Schwartz controlled named AAMM Printing ("AAMM"), K&S Supply ("K&S"), and SOS Printing ("SOS"), to issue false and fraudulent invoices to Jitney. Those invoices were false and fraudulent because they purported to represent the sale of goods or services that had never been provided and were not intended to be provided to Jitney;

(b) Between approximately June 1992 and approximately 1997, Merberg caused Jitney to draw more than 100 checks payable to AAMM, SOS, and K&S in response to the false and fraudulent invoices. Schwartz cashed the checks and gave a large percentage, approximately 93%, of the value of the checks in cash to Merberg or to a person designated by Merberg; and

(c) Merberg caused Jitney to treat the full value of the checks issued to AAMM, K&S, and SOS as cost of goods sold or other deductions in its books and records for 1992, 1993, 1994, 1995, 1996, and 1997, despite the fact that there were no actual expenses and that Merberg received approximately 93% of the value of the checks back in cash. Merberg further caused Jitney fraudulently to deduct the value of those checks on its U.S. Corporation Income Tax Return, Form 1120, for tax year 1992, and its



U.S. Income Tax Returns for an S Corporation, Forms 1120S, for tax years 1993, 1994, 1995, 1996, and 1997.

74. Merberg also caused Jitney to issue checks to certain of its suppliers and improperly to deduct the amount of those checks as cost of goods sold on Jitney's corporate income tax returns, as described below:

(a) Beginning in approximately late 1996 or early 1997, Merberg instructed certain Jitney employees to seek out suppliers that would cash checks drawn by Jitney. Those employees arranged for four separate companies that were regular suppliers to Jitney (collectively the "Jitney Suppliers") to cash checks. Two of the Jitney Suppliers were located in the Bronx, New York;

(b) On numerous occasions in 1997 and 1998, Merberg caused Jitney to draw checks payable to the Jitney Suppliers and received back the full value of the checks in cash; and

(c) Merberg caused Jitney to treat the full value of the checks issued to the Jitney Suppliers as cost of goods sold in its books and records and on its tax returns for tax years 1996 and 1997, despite the fact that Merberg received all of the value of the checks back in cash.

75. Merberg and Jitney used some of the cash received from Schwartz and from the Jitney Suppliers to pay kickbacks to employees responsible for purchasing food and related items at certain Jitney customers. Merberg and Jitney also used some of the cash received from Schwartz and from the Jitney Suppliers to pay employees responsible for

purchasing food and related items at certain Jitney customers their share, usually 40%-50%, of funds that Merberg, Jitney, and the employees had embezzled from the Jitney customers by arranging for the customers to pay false and fraudulent invoices issued by Jitney.

## XXV. OVERT ACTS

In furtherance of the conspiracy, and to effect the objects thereof, the following overt acts were committed in the Southern District of New York, and elsewhere:

76. On approximately May 9, 1997, Jitney issued a check to AAMM Printing in the amount of \$7,875.

77. On approximately May 9, 1997, Jitney issued a check to AAMM Printing in the amount of \$6,380.

78. Between approximately 1992 and approximately 1997, Merberg caused Jitney to issue to AAMM, K&S, and SOS more than 150 checks with a face value of more than \$1 million. Merberg then caused these checks to be given to Schwartz in exchange for cash and false and fraudulent invoices.

79. On numerous occasions in 1997 and 1998, Merberg caused Jitney to issue more than 100 checks, with a face value of more than \$1 million, to the Jitney Suppliers, and received that same amount back in cash.

80. On or about March 14, 1997, Jitney filed a U.S. Income Tax Return for an S Corporation, Form 1120S, for tax year 1996 that falsely overstated Jitney's cost of goods sold or other deductions.

81. On or about July 15, 1998, Jitney filed a U.S. Income Tax Return for an S Corporation, Form 1120S, for the tax year 1997 that falsely overstated Jitney's cost of goods sold or other deductions.

82. On or about August 25, 1997, Merberg and his spouse filed a U.S. Individual Income Tax Return, Form 1040, for the tax year 1996 that falsely represented their true total income.

83. On or about April 10, 1998, Merberg and his spouse filed a U.S. Individual Income Tax Return, Form 1040, for the tax year 1997 that falsely represented their true total income.

IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 371

Dated:

---

JOHN M. NANNES  
Acting Assistant Attorney General

---

RALPH T. GIORDANO  
Chief, New York Office

---

JAMES M. GRIFFIN  
Deputy Assistant Attorney General

---

REBECCA MEIKLEJOHN

---

SCOTT D. HAMMOND  
Director of Criminal Enforcement

---

DOUGLAS M. TWEEN

Antitrust Division  
U.S. Department of Justice

---

MARY ANNE F. CARNIVAL

---

MARY JO WHITE  
United States Attorney  
Southern District of New York

---

DEBRA C. BROOKES

---

ELIZABETH B. PREWITT

Attorneys

Antitrust Division  
U.S. Department of Justice  
26 Federal Plaza, Room 3630  
New York, New York 10278  
(212) 264-0654